

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
GOCO REALTY FUND, I, a California
limited partnership ,
Debtor.

Case No. 92-5-3651-MM

Chapter 11

**ORDER ON MOTION FOR RELIEF
FROM STAY**

INTRODUCTION

This matter comes before the Court on the Motion of New West Federal Savings and Loan Association ("New West") for Relief from the Automatic Stay (the "Motion") based on the following grounds:

1) That this case was filed in bad faith by the debtor, GOCO Realty Fund I, a California Limited Partnership ("Debtor" or "GOCO"), warranting relief for cause under Section 362(d)(1) of the Bankruptcy Code;

2) That in its prepetition negotiations with New West, GOCO agreed to the lifting of the stay in the event it filed bankruptcy, warranting relief for cause under Section 362(d)(1);

3) That the Debtor does not have an equity in the property and the property is not necessary to an effective reorganization, warranting relief under Section 362(d)(2); and

4) That New West's interest in the subject properties is not adequately protected, warranting relief for cause under Section 362(d)(1).

For the reasons to be discussed, the Motion is denied without prejudice to New West to bring

1 another motion before the Court at such time as relief may be appropriate. Many factors, including the
2 progress in other aspects of this case, may affect counsel's determination of when to renew the motion.

4 **FACTS**

5 The Debtor filed a voluntary chapter 11 petition on May 21, 1992. It scheduled New West as
6 a secured creditor in the amount of \$255,905,240 holding a first mortgage on the Debtor's portfolio of
7 42 commercial properties.

8 A preliminary hearing on the Motion was held on August 13, 1992. On August 19, 1992, the
9 Court issued a Memorandum Decision and Order Thereon denying relief from the automatic stay based
10 on the first three grounds. The Court reserved ruling on the remaining issue of whether New West's
11 interest in the subject properties is adequately protected pending a final hearing. In the Memorandum
12 Decision, the Court requested that the parties brief the issue of the appropriate allocation of the burden
13 of proving that the collateral is appreciating or declining in value.

14 At a status conference held on October 5, 1992, the parties stipulated that the creditor has the
15 burden of proving that the value of the collateral is declining. Counsel advised the Court that New West
16 currently does not wish to incur the expense of procuring appraisals on the collateral properties. The
17 parties did not wish to introduce further evidence or to make additional arguments and submitted this
18 matter at the conclusion of the status conference.

20 **DISCUSSION**

21 **A. Lack of Adequate Protection**

22 New West would be entitled to relief from the automatic stay based on the lack of adequate
23 protection upon demonstrating that the value of the properties is declining without compensation to New
24 West. United States Savings Association of Texas v. Timbers of Inwood Forest, 484 U.S. 365, 370
25 (1988). However, no such evidence has been introduced. Based on the evidence that is before this
26 Court, the Court is compelled to deny the Motion because New West has failed to meet its burden of
27 making a prima facie showing that it lacks adequate protection.

28 Recognizing New West's reluctance to incur the expense of procuring appraisals, the Court notes

1 that introducing appraisals of specific properties or of the entire portfolio is not the sole means of
2 demonstrating a decline in the value of the collateral. However, without additional evidence to assist the
3 Court in resolving the issue on its merits, the Court is left with no option but to deny the relief requested
4 by New West on the basis that its interest is not adequately protected.

5 **B. Relief Under Section 362(d)(2)**

6 In its Memorandum Decision, the Court denied relief under Section 362(d)(2), determining that
7 it is premature to require the debtor to demonstrate the confirmation requirements of Section 1129(a).
8 See Timbers, 484 U.S. at 376. To amplify the Court's prior ruling with respect to the standard set forth
9 in Timbers, a determinative fact is the amount of the debt owed to New West. To determine the amount
10 of the debt requires consideration of: 1) the doctrine articulated in D'Oench, Duhme & Co. v. FDIC, 315
11 U.S. 447 (1942); 2) GOCO's entitlement to offsets; and 3) the appropriate characterization and
12 application of the payments that New West is currently receiving from GOCO.

13 The preferred practice for considering the debtor's claim to affirmative defenses such as the offsets
14 claimed by GOCO is to determine the debtor's affirmative defenses other than in the relief from stay
15 context, which is summary in nature. See In re Vitreous Steel Products Co., 911 F.2d 1223, 1238-39
16 (7th Cir. 1990)(scope of issues to be determined in stay proceedings is narrow). Instead, this
17 determination generally is made in an adversary proceeding to enjoin the creditor from taking any action
18 against the collateral after the automatic stay has been lifted. In an adversary proceeding, the Court can
19 consider the merits of the defenses based upon the appropriate standards for the issuance of an injunction.

20
21 Some courts have considered the debtor's affirmative defenses in the context of relief from stay
22 proceedings where, as here, the RTC is a party to the proceeding. See In re Shehu, 128 Bankr. 26, 29
23 (Bankr. D. Conn. 1991). The Court is particularly concerned with granting relief from the stay and
24 proceeding by way of injunction in this case because of that line of cases which preclude the issuance of
25 an injunction against the administrative proceedings of the RTC. See Coit Indep. Joint Venture v.
26 FSLIC, 489 U.S. 561 (1989); 281-300 Joint Venture v. Onion, 938 F.2d 35 (5th Cir. 1991), cert. denied,
27 ___ U.S. ___, 112 S.Ct. 933 (1992).

28 The amount of New West's claim and the appropriateness of GOCO's offsets are determinations

1 central to this case. The Court's ruling assumes that the determination of the validity of the debtor's offset
2 claims would be unwieldy and, perhaps, inappropriate in the relief from stay context. Instead, these
3 issues should be addressed more fully so that the Court may review the merits of the debtor's
4 counterclaims to enforcement and New West's counterdefenses to those claims in view of the D'Oench,
5 Duhme doctrine.

6
7 **CONCLUSION**

8 For the reasons set forth above, New West's Motion for Relief from the Automatic Stay is denied
9 without prejudice.